

1
2
3
4
5
6
7
8
9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 BRYAN VESS, on behalf of himself
12 and all others similarly situated,

13 Plaintiff,

14 v.

15 BANK OF AMERICA, N.A.; and
16 DOES 1 through 50, inclusive,

17 Defendants.

Civil No.10cv0920 AJB (WVG)

PRELIMINARY APPROVAL AND
PROVISIONAL CERTIFICATION
ORDER

18 This Court considered plaintiff Bryan Vess' unopposed motion for preliminary
19 approval of class settlement and provisional class certification under Rule 23 of the
20 Federal Rules of Civil Procedure. This Court reviewed the motion, including the
21 Settlement Agreement. Based on this review and the findings below, the Court found
22 good cause to grant the motion.

23 **FINDINGS:**

24 1. The Settlement Agreement was the product of serious, informed,
25 non-collusive negotiations, has no obvious deficiencies, does not improperly grant
26 preferential treatment to the proposed class representatives or segments of the class, and
27 falls within the range of possible approval;
28

1 2. The Notice, attached to the Settlement Agreement, complies with due
2 process because the notices and forms are reasonably calculated to adequately apprise
3 class members of (i) the pending lawsuit, (ii) the proposed settlement, and (iii) their
4 rights, including the right to either participate in the settlement, exclude themselves from
5 the settlement, or object to the settlement;

6 3. The Class is so numerous that joinder of all Class members is impracticable;

7 4. Plaintiff's claims are typical of the Class's claims;

8 5. There are questions of law and fact common to the Class, which predomi-
9 nate over any questions affecting only individual Class Members; and

10 6. Class Certification is superior to other available methods for the fair and
11 efficient adjudication of the controversy.

12 7. Defendant Bank of America, N.A. gave notice pursuant to 28 U.S.C. §
13 1715(b) on April 26, 2013.

14 **IT IS ORDERED THAT:**

15 1. **Preliminary Settlement Approval.** The Court preliminarily approves the
16 Settlement Agreement, including the Notice attached to the Settlement Agreement as
17 Exhibit B.

18 2. **Provisional Certification.** The Class is provisionally certified as:
19 All current Bank of America customers in the United States that have HELOC Accounts
20 that were suspended or reduced based on Bank of America's claim that the property
21 securing the HELOC had significantly declined in value.
22 Excluded from the Class are the Judges presiding over this case and any of their employ-
23 ees or immediate family members.

24 3. **Provision of Class Notice.** No later than sixty (60) days after the Court
25 enters this Order, Defendant will notify Class Members of the settlement via first class
26 mail to the Class' last known mailing addresses. Defendant shall re-mail any returned
27 mail after obtaining updated addresses via the United States Postal Service's national
28

1 change of address registry. Defendant will pay for all costs associated with providing
2 notice to the Class.

3 **4. Objection to Settlement.** Any Settlement Class Member who does not
4 opt-out and who wishes to object to the Settlement must file a written Objection ("Objec-
5 tion") with the Court, and mail and serve it upon Class Counsel and Counsel for Defen-
6 dant. The Objection must be postmarked no later than forty-five (45) days after the Class
7 Notice. To be considered valid, each Objection must be timely filed and served and must
8 (i) set forth the Settlement Class Member's full name, current address, and telephone
9 number; (ii) contain the signatures of all living borrowers on the account; (iii) state that
10 the Settlement Class Member objects to the Settlement, in whole or in part; (iv) set forth
11 the legal and factual bases for the objection; and (v) provide copies of all documents or
12 writings that such Settlement Class Member desires the Court to consider in support of
13 his/her position. All living borrowers to a loan must object for the objection to be valid.
14 Any Settlement Class Member who wishes to object and appear at the final approval
15 hearing in person instead of submitting only written objections must include in the
16 written objection a notice of intention to appear at the final approval hearing. Class
17 Counsel is to respond to any Objections and file any additional materials in support of
18 final approval no later than seven (7) days before the final approval hearing.

19 **5. Failure to Object to Settlement.** Class Members who fail to object to the
20 Settlement Agreement in the manner specified above will: (1) be deemed to have waived
21 their right to object to the Settlement Agreement; (2) be foreclosed from objecting
22 (whether by a subsequent objection, intervention, appeal, or any other process) to the
23 Settlement Agreement; and (3) not be entitled to speak at the Fairness Hearing.

24 **6. Exclusion Requests.** All Class members who want to be excluded from the
25 Settlement must send a letter to the address set forth in the Notice (which will be a
26 secured P.O. Box address provided by Defendant), postmarked no later than forty-five
27 (45) days after the Notice is mailed. The letter must include: (i) signatures of all loan
28 debtors (including joint debtors and co-debtors) on the account; (ii) the full name,

1 address, and Defendant's account number(s) of the person requesting exclusion; and (iii)
2 a written statement that he or she does not want to participate in the Settlement. A
3 request for exclusion that does not comply with all the foregoing requirements shall be
4 invalid, and the person(s) serving such a request shall be bound by the Settlement
5 Agreement, if finally approved. No Class member may purport to exercise any exclusion
6 rights of any other person, or purport to exclude other Class members as a group,
7 aggregate, or class involving more than one person, or as an agent or representative.
8 Any such purported exclusion shall be invalid.

9 **7. Valid Exclusion Requests.** Any Class member who successfully opts out
10 of the Settlement shall be deemed to have waived any rights or benefits under the
11 Settlement, and will have no standing to object to the Settlement.

12 **8. Modifications to Settlement.** The Court reserves the right to approve the
13 Settlement with such modifications, if any, as may be agreed to by Class Counsel and
14 Counsel for Bank of America and without future notice to the Settlement Class Mem-
15 bers.

16 **9. Appointment of Class Representative and Class Counsel.** Plaintiff Bryan
17 Vess is provisionally appointed as the Class Representative to implement the Parties'
18 proposed Settlement in accordance with the Settlement Agreement. Plaintiff's Counsel,
19 James R. Patterson and Alisa A. Martin of Patterson Law Group, APC and Steven L.
20 Woodrow of Edelson LLC are appointed as Class Counsel. Plaintiff and Class Counsel
21 must fairly and adequately protect the Class' interests.

22 **10. Termination.** If the Settlement Agreement terminates by its terms for any
23 reason, including, but not limited to, if Court does not approve the Settlement or enter
24 the Final Order and Judgment, or if the Final Settlement Date under the Settlement
25 Agreement does not occur for any reason, the following will occur: (a) this Order will be
26 vacated; (b) class certification will automatically be vacated. Plaintiff will stop function-
27 ing as a class representative and Class Counsel will revert to interim class counsel; and
28

1 (c) this Action will revert to its previous status in all respects as it existed immediately
2 before the Parties executed the Settlement Agreement.

3 11. **No Admission.** Nothing in this Order, the Settlement, or the Settlement
4 Agreement, is or may be construed as, an admission or concession on any point of fact or
5 law by or against any Party.


6 12. **Stay of Dates and Deadlines.** All discovery and pretrial proceedings and
7 deadlines, are stayed and suspended until further notice from the Court, except for such
8 actions as necessary to implement the Settlement Agreement and this Order.

9 13. **CAFA Notice.** Defendants have complied with 28 U.S.C. § 1715(b).

10 14. **Final Approval Hearing.** A Final Approval Hearing shall be held before
11 this Court on **September 6, 2013 at 1:30 p.m. in Courtroom 3B** to determine whether
12 the Settlement Agreement should be finally approved as fair, reasonable, and adequate.
13 All papers supporting Plaintiffs' request for attorneys' fees and costs must be filed no
14 later than fourteen (14) calendar days before the deadline for Class Members to object to
15 the settlement. All other papers supporting Final Approval of the Settlement Agreement
16 must be filed no later than seven (7) calendar days before the Fairness Hearing. This
17 Court may order the Fairness Hearing to be postponed, adjourned, or continued. If that
18 occurs, Defendant will not be required to provide additional notice to class members.

19 IT IS SO ORDERED.

20
21 DATED: April 29, 2013

22 
23 Hon. Anthony J. Battaglia
24 U.S. District Judge
25
26
27
28